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**TESTIMONY OF PROFESSOR JOCELYN BENSON, ESQ.**  
**FOUNDER AND CEO, MICHIGAN CENTER FOR ELECTION LAW**  
**DIRECTOR, MICHIGAN CITIZENS' REDISTRICTING COMPETITION**  
BEFORE THE MICHIGAN HOUSE COMMITTEE ON REDISTRICTING AND ELECTIONS  
MAY 17, 2010

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Good morning. I would like to thank the House Committee on Redistricting and Elections for holding this hearing and for inviting me to present testimony this morning.

I am here today in my capacity as the Founder and CEO of the Michigan Center for Election Law, and as the Director of the Michigan Citizens' Redistricting Competition. I thus will limit my remarks to two areas, a description of the Competition and its winning entries, which I hope you will consider, and my recommendations to the committee on one aspect of federal law relating to redistricting.

**Michigan Citizens' Redistricting Competition<sup>1</sup>**

The 2011 "Michigan Citizens' Redistricting Competition" is a nonpartisan project of the Michigan Center for Election Law and Administration, in partnership with the Michigan Redistricting Collaborative (which includes groups such as Common Cause, the League of Women Voters, and Michigan Nonprofit Association).

Our concern is, simply, that the current process has led to increased gerrymandering, and has allowed political parties to increase their majorities and limit competition, which is the foundation of a healthy functioning democracy.

Our hope is that, through providing tools for any Michigan citizen to craft and design their own redistricting maps for Congressional or Michigan legislative districts, we will help to provide citizens with a meaningful voice in the 2011 redistricting process. We also hope to demonstrate that an open, transparent redistricting process based on objective criteria and citizen input can produce fair legislative districts in Michigan.

The 2011 "Michigan Citizens' Redistricting Competition" therefore will allow any Michigan citizen with the tools and opportunity to produce potential district maps for Michigan's 14 Congressional Seats, or Michigan's state senate or legislative seats. The maps will be then scored based upon objective criteria, such as how well they keep county and city residents in one district or how close each district comes to having the same number of people.

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<sup>1</sup> Attached please find several news articles describing the competition, including an article posted by a contributor to the Detroit News' Conservative Website, "The Michigan View."

I developed the idea after being inspired by the former Ohio Secretary of State, Jennifer Brunner, who held the first competition of this kind in 2009. Information about that competition can be found at [www.ohioreddistricting.org](http://www.ohioreddistricting.org). More recently, Christopher Newport University and the Public Mapping Project sponsored the Virginia College and University Legislative Redistricting Competition earlier this year, which invited college student teams to draw legislative lines for the Virginia House of Delegates, Senate of Virginia, and federal congressional lines for the House of Representatives.

For our competition here in Michigan, citizens are invited to produce district maps that will be then scored based upon objective criteria. The maps that best fit with objective and fair criteria will be submitted to you for consideration at 5pm on May 23, 2011.

Entrants can visit <http://www.michiganreddistricting.org>, enter some basic information and begin drawing their maps. The site provides a variety of mapping tools, as well as population information and legal guidance to help each entrant develop fair, legal maps.

The entrants will use redistricting software hosted online by the Midwest Democracy Network and developed by George Mason University Professor Michael McDonald and the Public Mapping Project. To learn more about the Public Mapping Project, contact Dr. Michael McDonald ([mmcdon@gmu.edu](mailto:mmcdon@gmu.edu)) or visit [www.publicmapping.org](http://www.publicmapping.org).

### ***Judges and Judging Criteria***

A nonpartisan panel of seven judges developed the criteria to evaluate and score the plans, based upon the criteria used in the aforementioned competitions in Ohio and Virginia. The seven judges are:

- Jowei Chen, Assistant Professor of Political Science, University of Michigan
- Kristen Clarke, Esq. Co-Director of Political Participation Project, NAACP Legal Defense and Education Fund
- Marcia Johnson-Blanco, Esq., Co-Director of Voting Rights Project, Lawyers Committee for Civil Rights
- Kurt Metzger, Director, Data Driven Detroit
- Anthony Saliccioli, Teacher, Clarenceville Public Schools & President-Elect, Michigan Council on Social Studies
- Jeff Williams, Chief Executive Officer, Public Sector Consultants
- Hal Ziegler, Former Republican State Senator, Michigan State Senate

The panel developed the following objective criteria for evaluating the plans. The criteria is based on federal and state law, as well as traditional redistricting principles that legal experts generally agree should be adhered to in the creation of objective and fair redistricting plans.<sup>2</sup> Winning plans will be selected based upon how well they meet eight objective traditional redistricting factors:

1. Contiguity: is every part of every district connected?
2. Voting Rights Act Compliance: does the plan contain the required number of majority African American districts? (per the recommendation of the Black Legislative Caucus)

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<sup>2</sup> See, e.g., The Brennan Center for Justice at New York University School of Law's comprehensive *Citizens Guide to Redistricting*.

3. Equipopulation: Does each district have roughly the same number of people in it? (You can deviate up to 1% for Congressional districts, 5% for State legislative and Senate districts)
4. Preserve existing city and county boundaries: Do districts avoid splitting counties and cities as much as possible?
5. Compactness: Is the shape of districts as close to a circle or square as possible?
6. Competitiveness: Does the map contain districts where there is a balanced percentage (i.e., close to 50%/50%) of Republican and Democratic voters?
7. Partisan Representation: Does the map create roughly the same number of majority Democratic and majority Republican districts?
8. Preserving Communities of Interest: Does the map make an effort to keep some smaller communities (college campuses, language minority populations) together in one district to preserve their voting strength?

Once a map is completed, it must be submitted to the competition by noon ET on Monday May 23, 2011 to receive full consideration.

This nonpartisan competition is a unique and meaningful opportunity for us as citizens to contribute to decisions that affect our future as Michigan voters. And it's important because, ultimately, voters should have the sole authority to choose their representatives, not the other way around.

### **The U.S. Constitution and the Voting Rights Act**

Finally, I would like to touch upon about a legal issue that I recommend you consider in selecting a districting plan to select.

The United States Constitution and Section 5 of the Voting Rights Act have a historically supportive and amicable relationship, as the U.S Supreme Court articulated shortly after the 1965 passage of Section 5 in *South Carolina v. Katzenbach*.<sup>3</sup> You are already aware that, in its opinion in *Reynolds v. Sims*,<sup>4</sup> the U.S. Supreme Court has stated the importance of ensuring that each district has an equal population under the one person, one vote principle implicit in the Equal Protection Clause of the U.S. Constitution. And I know that you also are informed on some of the issues to consider in complying with Sections 2 and 5 of the Voting Rights Act.

I want to comment, just briefly on the intersection of Supreme Court's 1994 opinion in *Shaw v. Reno*,<sup>5</sup> authored by Justice O'Connor. The opinion concluded that a citizen in an racially gerrymandered district could state a claim under the Fourteenth Amendment if they could feasibly allege that traditional districting principles, such as respect for political subdivisions, compactness, and contiguity, had been set aside in deference to considerations of the racial makeup of the district.<sup>6</sup> Most notably, the opinion expressed great concern over the

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<sup>3</sup> 383 U.S. 301 (1966).

<sup>4</sup> 377 U.S. 533 (1964)

<sup>5</sup> 113 S. Ct. 2816 (1993). For a detailed analysis of *Shaw v. Reno* and its implications, see, e.g., Richard H. Pildes, *Expressive Harms, "Bizarre Districts," And Voting Rights: Evaluating Election-District Appearances After Shaw V. Reno*, 92 Mich. L. Rev. 483, 494-497 (1993).

<sup>6</sup> See, *Shaw*, 113 S. Ct. at 2824 ("Today we hold only that appellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification.")

shape of the districts in North Carolina's plan, referring to them as "dramatically irregular,"<sup>7</sup> and "bizarre."<sup>8</sup> O'Connor emphasized the importance of appearance in redistricting, pontificating that when "redistricting legislation ... is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles," the legislation could violate the Equal Protection Clause of the Fourteenth Amendment.<sup>9</sup> Under *Shaw*, such legislation would be subjected to strict scrutiny, surviving judicial review only if the state could show a compelling interest in the plan, and that the consideration of racial demographics when drawing the plan was narrowly tailored to advance that interest.<sup>10</sup>

*Shaw* was groundbreaking because it created a new, "analytically distinct" cause of action under the Equal Protection Clause.<sup>11</sup> After *Shaw*, any plaintiff living in a gerrymandered district could allege that an apportionment plan, though facially neutral, violated the Equal Protection Clause where it rationally could not be understood as anything other than an effort to separate voters into different districts on the basis of race, without sufficient justification.

The issue in *Shaw*, importantly, was not whether Voting Rights Act compliance was unconstitutional. The issue was whether race could be the only or predominant consideration in drawing district lines. It cannot.

The Supreme Court clarified this issue four years after *Shaw*, in a case called *Miller v. Johnson*.<sup>12</sup> Justice Kennedy delivered the opinion and emphasized the permissibility of considering racial demographics, but said that this could not be the "predominant factor" for motivating the legislature to draw districts a certain way. In a case called *Bush v. Vera*,<sup>13</sup> Justice O'Connor reaffirmed and clarified this, finding that a Texas legislature went well beyond what was necessary to comply with the Voting Rights Act in drawing district lines.

I bring these cases to your attention because it is important to ensure that Voting Rights Act compliance remains a critical component of your selection of a district plan. I mention them also to encourage you to consider many other factors in drawing district lines as well, such as the aforementioned criteria that the competition judges are considering in evaluating what we affectionately term the "People's Plans."

Thank you again for the opportunity to testify before you today, and for inviting public comment on the redistricting process at this hearing.

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<sup>7</sup> Id 2820.

<sup>8</sup> Id. at 2822.

<sup>9</sup> Id. O'Connor also emphasized her "belie[f] that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group -- regardless of their age, education, economic status, or the community in which they live -- think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions ... as impermissible racial stereotypes."

<sup>10</sup> Id.

<sup>11</sup> *Shaw* at 2820. ("Nothing ... precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification.")

<sup>12</sup> 515 U.S. 900 (1995).

<sup>13</sup> 517 US 952 (1996) (challenging the constitutionality of Texas' 1990 congressional redistricting plan).

May 3, 2011

<http://detnews.com/article/20110503/MIVIEW/105030301>

## Reboot redistricting

DAN CALABRESE

The once-a-decade ritual of legislative redistricting is one of those issues on which most people's positions are entirely partisan. (Sort of like the way Democrats used to complain about the president's usurpation of power, and Republicans complain about the same thing now.)

If you're a Democrat in most places these days, you worry that the whole thing will be political. If you're a Republican, you're pretty pumped about the fact that your side won control of legislatures all across the country at just the right time, so they can manipulate the process - er, I mean, redraw the lines in a spirit of nonpartisan fairness.

Ha ha! You're funny.

If one can peel away the partisan scales over their eyes, one would have to recognize that the process of redistricting is inherently corrupt regardless of who is in charge. You have elected representatives essentially choosing their voters, usually leaving the outcome a foregone conclusion when the voters get the chance to choose their representatives. If you can think of a more blatant conflict of interest, let me know.

If you've ever wondered how easy it would be to draw the district map - assuming you were just trying to draw a fair map and not try to manipulate it for your own political purposes - Michigan residents have a chance to give it a shot right now.

The Michigan Citizens Redistricting Competition, which started on Monday, is one of the coolest things I've seen in politics in a long time. It gives Michigan residents a chance to go online at <http://www.michiganredistricting.org/> > [www.michiganredistricting.org](http://www.michiganredistricting.org), access software and essential information, and take their own shot at redrawing the districts for members of Congress, state senators and state representatives.

It is the brainchild of a Democrat, Jocelyn Benson, the 2010 secretary of state candidate and Wayne State election law professor. She didn't invent the concept, as it's already been done successfully in several other states. But Benson has spearheaded the effort to make the competition happen in Michigan.

Now, because a liberal Democrat is leading the effort, I am duty-bound as a conservative pundit to thoroughly examine the whole thing, digging deep into the real motivation behind it, and bring you the complete, untold story. So I have delved deep. And here's what I've found.

The competition is awesome. Sorry, conservatives. I guess it's time for you to drum me out of the movement. *Again.* In fact, I'd say the redistricting competition is a test of Michigan conservatives' intellectual honesty. Conservatives always criticize liberals for trusting government instead of the people. Benson's competition gives the people the chance to show they can tackle redistricting better than government can. She's put together a bipartisan panel of judges who will pick out the best entries and submit them to the legislature. Explain to me what the principled conservative objection to that is.

The outcome of the competition just might put some pressure on the Republicans who are drawing the real maps. It just might expose attempts to manipulate the process in their favor. Does that bother you because you vote Republican and you want them to take any advantage they can get? It doesn't bother me. If you believe in Republican policies, what you should be looking for is Republicans who are willing to take their message to voters of all stripes, not make themselves fat and happy by setting themselves up in districts they can't lose - regardless of whether they actually govern for the benefit of the people.

If you ask me, we'd be better off if elected officials got out of the way and let someone else draw the district lines. I know they're the ones accountable to the people, but this is such an egregious conflict of interest, there's simply no way theoretical accountability can make up for it - especially when the whole game is designed to *protect* them from accountability at the polls.

Enter the competition. See how you do. And if you discover - as I think you will - that fair districts are easy to draw if you actually want to, then give some thought to holding your own side accountable for a change. And don't dismiss the whole thing just because a Democrat made it happen.

(Michigan residents can enter the Michigan Citizens Redistricting Competition at <http://www.michiganredistricting.org/> The competition began on May 2.)

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